No. 14795

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

ERNEST EVERETT,

Appellee.

APPELLANT'S BRIEF

Appeal from the District Court of the United State for the Eastern District of Washington, Northern Division

HON. SAM M. DRIVER, *Judge*

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STATUTES

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STATEMENT AS TO JURISDICTION

This is an appeal from a final judgment in the sum of $8632.76 entered on the verdict of the jury in plaintiff's favor. Appellee sued appellant, a Wisconsin corporation doing business as a common carrier within the State of Washington, and F. W. Scobee, an engineer, in the District Court of the United States for the Eastern District of Washington, Northern Division, to recover damages in the sum of $31,332.76

for the death of his seventeen year old daughter as the result of a crossing collision between a panel truck which she had been driving and one of defendant's trains. The complaint as lodged did not confer jurisdiction upon the District Court since such jurisdiction could only arise out of diversity of citizenship. While it was alleged that the appellant railroad was a foreign corporation, there was no allegation as to the residence or citizenship of either the plaintiff or the defendant engineer. (Tr. 2-4)

Appellant had not previously raised the question of lack of jurisdiction, reserving its right to so do to a subsequent period in the course of the litigation. During the course of the trial plaintiff asked leave to amend the complaint by dismissing F. W. Scobee, the engineer, as a defendant in the action, and alleging that plaintiff was a resident and citizen of the State of Washington. (Tr. 39-40) Under the complaint as amended the District Court would appear to have acquired jurisdiction under Section 41 (Judicial Code, Sec. 24, amended; U.S.C.A., Title 28, Sec. 41).

The jury awarded a verdict in the sum of $8632.76 in favor of plaintiff appellee and against appellant, upon which verdict judgment was entered January

21, 1955; (Tr. 15-16) thereafter on January 28, 1955, appellant interposed a motion to set aside the verdict and the judgment entered thereon or in the alternative for a new trial; (Tr. 16-25) this alternative motion was denied by order of the District Judge on March 17, 1955. (Tr. 26-27)

On April 12, 1955, appellant filed a notice of appeal with the District Court, the notice being in the manner and within the time provided by Rule 73 of the Federal Rules of Civil Procedure, and on the same day appellant filed the required appeal bond. (Tr. 26-30) On May 5, 1955, the District Court by order extended the time for filing the record with this Court up to and including the 27th day of June, 1955; (Tr. 30) on May 3, 1955, appellant filed in the District Court its designation of contents of record on appeal and on May 16, 1955, filed its supplemental designation of record with the District Court. (Tr. 31-32) The record was docketed with this Court on July 9, 1955. Upon the foregoing facts this Court has jurisdiction of this appeal by virtue of Title 28, U.S.C.A., Secs. 1291 and 2107 and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

By a crossing collision between a panel truck which had stalled on a country crossing on the main line of the appellant railroad near Ellensburg, Washington, and one of the railway company's passenger trains, plaintiff's daughter was instantly killed. Plaintiff brought this suit in the District Court of the United States, for the Eastern District of Washington, Northern Division, to recover $31,332.76 damages for her death.

The complaint in paragraph VI recited seven separate charges of negligence. (Tr. 5-6) In paragraph VII, under an allegation of wanton misconduct, there were four separate allegations of negligence. (Tr. 6, 7, 8)

On motion of defendant, all charges of negligence were withdrawn from jury consideration except:

(a) Failure to give the statutory crosing signals;

(b) Failure to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking;

(c) Last clear chance. (Tr. 517-518)

The attention of this Honorable Court is particularly directed to paragraph V of the complaint, which reads as follows:

> "That on or about the 8th day of March, 1952, at about the hour of 2:50 p.m. on said day, Erna Mae Everett was operating a 1938 Dodge panel truck owned by the plaintiff herein, in a general northerly direction along said O'Neill Road; that as Erna Mae Everett attempted to use said public crossing to cross over said right of way and track, said panel truck she was driving stalled squarely on the defendant company's railroad tracks; that at the same time and place defendants were operating a passenger train in a general westerly direction over and along said railroad track and at said time and place defendants ran said passenger train into and against the panel truck Erna Mae Everett was operating as aforesaid, whereby the said Erna Mae Everett was violently crushed and injured and shortly thereafter the said Erna Mae Everett died from the injuries so received." (Tr. 4-5)

The accident occurred approximately at the time alleged and there is no dispute that it was a clear day without any impairment of vision as the result of weather conditions. As stated by one of plaintiff's witnesses, John J. O'Neill:

> "It was a nice, clear day." (Tr. 285)

As alleged in the complaint, the main line of the Northern Pacific Railway Company at the point of

accident extended in a general easterly and westerly direction. The roadway on which plaintiff's intestate was traveling extended in a general northerly and southerly direction. (Tr. 4, Defts. Ex. 1) The panel truck was being driven by plaintiff's daughter in a general northerly direction and defendant's passenger train was being operated in a general westerly direction. (Tr. 4-5) (Allegations of complaint) However, as shown by the map, Defendant's Exhibit 1, the tracks of the railway company extend somewhat in a northwesterly direction and the roadway along which the panel truck was being driven in a general northerly direction until at a distance of about 10 or 15 feet from the crossing its approach to the tracks is practically at right angles.

The truck in question was a 1940 model and was 10 years old when purchased second hand by plaintiff. (Tr. 132-133) Defendant's passenger train consisted of a Diesel locomotive and seven or eight passenger cars. (Tr. 205) Defendant's main line track east of the crossing was straight for a distance of 4 miles. The grade of the track as it approached the crossing, for a distance of 1400 feet east thereof, ranged from a zero grade to a .5 grade, the average

for said distance being about 3 inches per 100 feet. (Tr. 53) The grade of the country road over which the truck was being driven varied. In this connection we quote the testimony of defendant's Division Engineer, Walter R. Adams, called by plaintiff for the purpose of explaining defendant's Exhibit 1:

"Q. All right, now, if I have it correctly, to recap, we have 200 feet that is almost level?

A. Yes.

Q. With the exception of a few inches. The next 70 feet is an approximate two foot raise?

A. Yes.

Q. The next 70. Then beyond that, the next 30, is that correct?

A. The next, there is another two foot raise.

Q. There is another two foot raise?

A. Now, that 70 feet, excuse me, that 70 feet is, yes, that's right.

Q. There is a two foot raise?

A. Yes.

Q. All right, and then in the next — was it 20 feet, did you say?

A. 12 feet.

Q. The next 12 feet?

A. Is 6 inches up.

Q. Six inches up. And the last 18 foot? (48)

A. Well, the last 12 feet out, it would be the six inch raise.

Q. Then, the footage began, as you have indicated, 70 feet and the next 100 feet?

A. Yes." (Tr. 61, 62)

686 feet east of the middle of the crossing is located what is referred to in the record as an overpass. (Tr. 49) At this point the main line of the Milwaukee railroad crosses the main line of the Northern Pacific; (Tr. 46) 1323 feet east of the center of the crossing is a whitle post. (Ex. 1, Tr. 49)

With regard to the speed of the train plaintiff's witness, John J. O'Neill, testified that when he first saw it coming out from under the viaduct, or underpass, it was traveling between 55 and 60 miles an hour. (Tr. 292-294)

Plaintiff's witness, Lawrence Shaw O'Neill, stated that when he first saw it it was just coming under the underpass. (Tr. 303) At this point he fixes its speed at 50 to 55 miles per hour. (Tr. 309)

Engineer Scobee testified that during the last mile

to the crossing he had probably got up to 60 miles per hour or a little better. (Tr. 219)

Fireman Williams stated that the speed of the train at the whistle post was 60 miles per hour (Tr. 419) and that the maximum speed permitted at that point was 70 miles per hour. (Tr. 420)

Concerning the giving of whistle signals plaintiff, Ernest Everett, testified that his home was situated southeast of the crossing, (Tr. 66) and about a quarter of a mile back from the county road along which his daughter was traveling. (Tr. 67) After leaving the home and reaching the county road the deceased girl would travel a half mile in order to reach the crossing. (Tr. 135) When he first saw the train he states that it was opposite a billboard on the highway; (Tr. 93) this billboard according to plaintiff's testimony was a mile and 3/10ths east of the crossing. (Tr. 99) His daughter went out of his line of vision 3/10ths of a mile from the crossing; (Tr. 100) this was at about the time that he also saw the train. He tesified he heard

> "two or three toots of the whistle, sharp toots." (Tr. 94)

Plaintiff's witness, John J. O'Neill, testified that the first whistle signals he heard were three sharp

toots. (Tr. 288) He fixed on Defendant's Exhibit 1 a point where he estimated the train to be and this is labelled "J. J. O'Neill" and marked as "Train." (Tr. 287)

Plaintiff's witness, Lawrence Shaw O'Neill, testified that when he first heard the whistle the train was just coming under the underpass. (Tr. 303-304) He stated that prior to this time he had not noticed any train whistle. (Tr. 304) As to the type of whistle given he testified as follows:

"Q. What kind of a whistle was it that you heard when you first heard it?

A. Two long blasts.

Q. Two long blasts. And by a long blast, in seconds, could you estimate it?

A. Well ——

Q. Pretty hard to do, but if you can. If you can't, that is all right too.

A. Well, I have heard the estimates here in the court and I think that would be just about right.

MR. McKEVITT: A little louder, please?

A. The two seconds for each blast and about the same in between.

Q. (By Mr. Connelly): That is your estimate of it, about two seconds a blast?

A. Yes.

Q. And you say you heard two of these?

A. Yes.

Q. And was it after that that you glanced down toward the crossing?

A. No, it was when he got about half way between the trestle and the crossing, well, he whistled three real sharp fast ones, and then was when I glanced at the crossing." (Tr. 305)

Engineer Scobee was called as an adverse witness. Since he had been dismissed as a party defendant it is appellant's contention that he was not adverse — in any event with reference to the whistle signals that were given. As a matter of fact, the trial Court ruled that he was not an adverse party within the purview of Rule 43, Subdivision b of Rules of Civil Procedure. (Tr. 243) He testified as follows:

"Q. All right. Will you tell us what happened after that?

A. Well, after glancing at the speedometer and approaching this whistle post, the whistle post is a sign that you are approaching a crossing and prepare to start blowing your whistle for this crossing.

Q. All right.

A. And I had reached for the whistle and started my procedure of blowing the whistle for this crossing.

Q. All right?

A. I had blowed one long whistle, and then there is a pause, and blowed another long whistle, and then this truck ——

Q. Where were you? Where were you when you blew one long whistle?

A. One long, and then a pause, and then another long one.

MR. McKEVITT: And another long?

A. Another long.

Q. (By Mr. Etter): A long whistle, what do you mean by a "long" whistle, would you tell us?

A. Well, at grade crossing, on your road crossings over railroad track, we have two long and a short and long whistle we blow for those crossings for a warning.

Q. The first one you blew was the long one?

A. The long whistle. (Tr. 250-251)

* * * *

Q. All right, what would a long whistle be, then, in seconds?

A. Well, your long whistle would run probably two seconds or a little better.

Q. Two seconds or a little better?

A. Yes.

Q. So you gave a long whistle, is that right?

A. Yes.

Q. And then a pause?

A. Then a pause.

Q. How long a pause?

A. I couldn't tell you.

Q. Well, would it be one second or two seconds?

A. Well, there was a pause in there, but I couldn't tell how long it was.

Q. It would be one second, at least, wouldn't it?

A. It would be more than one second, yes.

Q. Well, make it brief, would it be two seconds?

A. Around that neighborhood, I couldn't pin point it.

Q. Then you gave another long whistle?

A. Another long.

Q. Beg your pardon?

A. Another long whistle, yes.

Q. All right; and then what happened?

A. Then this truck showed up.

Q. When, right after the second long whistle?

A. Yes, after I had ceased blowing the second whistle. (Tr. 252-253) * * * *

Q. All right, and this whistle tooting you started, as I gather it, you started it as you came to the whistle post; isn't that right?

A. Yes, at the whistle post or shortly after the whistle post.

Q. Shortly —

A. I had arrived at the whistle post.

Q. You had arrived at the whistle post, and that is when you started whistling?

A. Yes." (Tr. 253)

It is the serious contention of appellant that appellee is bound by this testimony.

Fireman Williams, called as a witness on behalf of the defendant, testified as follows:

"Q. Now, do you remember whether or not any whistle signals were given by that train on that date? (Tr. 416)

A. Yes, there were.

Q. Are you familiar with this whistling post that we have been talking about here?

A. Yes, sir.

Q. With reference to that whistling post, where did the signals that you know were given start?

A. Well, they started at or very near the whistling post, I would say.

Q. What whistle signals were given by the engineer that you heard?

A. Well, he blew two long blasts.

Q. And then what did he do?

A. Well, he set the automatic air, service application.

Q. Did you give any whistle signals that date?

A. I did.

Q. And you were sitting up there in front with him?

A. Yes.

Q. What did you have to do in order to give these whistle signals?

A. Well, I jumped up out of the seat when I saw the truck start for the crossing after it had slowed down.

Q. What did you go for the whistle for?

A. Well, it looked to me like there was going to be an emergency there.

Q. Well, the engineer had been blowing the whistle, and why did you go for the whistle?

A. Well, you can't blow the whistle with your left hand and shut the throttle off at the same time.

Q. I see. In other words, you took over where he left off, is that what you are telling us? (Tr. 417)

A. That's right.

* * * *

Q. Do you know how many blasts of the whistle you gave?

A. No, I haven't any idea.

Q. Well, what type of whistle signal was it?

A. Just short blasts, continuous.

Q. What you call emergency blast whistles?

A. That is what I would call it.

Q. And do you know whether you gave more than one?

A. Yes, I know that.

Q. Do you think you gave more than two?

A. I would say so.

Q. Three?

A. Yes, I think more than three." (Tr. 418)

The only actual eye witnesses of the immediate approach of this truck to the crossing were the engineer and the fireman. Appellant emphasizes this statement because it is its firm conviction that the judgment in this case should be set aside and the action dismissed outright; this for the reason that the judgment can only be justified on the basis of the doctrine of Last Clear Chance.

Appellee called as witnesses the following persons:

(1) Walter R. Adams (Tr. 42);

(2) Ernest Everett (Tr. 63-91);

(3) Rena Everett (Tr. 328-347);

(4) Lee Klocke (Tr. 170-200);

(5) John J. O'Neill (Tr. 280-296);

(6) Lawrence Shaw O'Neill (Tr. 300-321);

(7) Francis William Scobee (Engineer) (Tr. 202).

The witness Walter R. Adams, appellant's division engineer, simply identified and explained Defendant's Exhibit 1, a map prepared by him or under his supervision, which was voluntarily furnished by appellant. (Tr. 40-41) The accuracy of this exhibit is not questioned. (Tr. 44)

Plaintiff appellee, Ernest Everett, the father of the deceased girl, testified that the truck that she was driving passed out of his view when it was still 3/10ths of a mile from the crossing. (Tr. 140-141)

Plaintiff appellee's witness, Rena Everett, the mother of the deceased girl, testified that the last time she saw her daughter was when the panel truck went through the outer gate on to the county road. (Tr. 322) It has already been pointed out that this was one-half mile distant from the crossing.

Plaintiff appellee's witness, Lee Klocke, lived about 80 rods north of the Everett home. (Tr. 170) His premises were likewise on the county road along which the girl traveled. He further testified that from the crossing to his gate was 80 rods. He was not an eye witness of the immediate approach of this truck to the crossing.

Plaintiff appellee's witness, John J. O'Neill, did not observe the truck as it approached the crossing. He was working in a field north of the crossing at a point designated as "X" on the map, with his initials next thereto. (Tr. 284) He testified as follows on direct examination:

> "Q. Now, did something out of the ordinary occur as you and the other fellows were standing there working?

A. Well, this accident happened there.

Q. Will you tell us what it was that first gave you notice that something out of the ordinary was happening?

A. Well, I don't know what really caused it, we just heard the train and looked up and there was a car on the crossing and the train coming. (Tr. 285)

* * * *

Q. Where was the train when you first heard the rumble and looked up and saw it?

A. Just coming under the underpass.

Q. Just coming under this Milwaukee underpass that is indicated on the map?

A. That's right.

Q. The concrete abutment business?

A. That's right. (Tr. 286)

* * * *

Q. When you first saw the train, as I understand it, that was as it was just emerging from the Milwaukee underpass?

A. That's right.

Q. Did your vision taken in the approaching automobile driven by the Everett girl at the same time?

A. Well, when we — the way we was standing there, we just looked and seen the train and the car both.

Q. Now, was the car on the crossing at that time?

A. That's right, yes.

Q. Did you see the girl at the time you saw the car?

A. She was in it.

Q. She was inside the car at that time?

A. Yes.

Q. Could you tell what she was doing in the car at that time?

A. Well, no, you couldn't tell what she was doing. You might imagine she was stalled or something, that it was stopped there.

Q. *The car was completely stopped and stalled when you first saw it?*

A. *That's right.*

Q. What happened then after you took this in with your eyes and saw this?

A. Well, she got out, shut the door, and just hesitated there, and then she took off.

Q. About how far was the train from her when she got out of the car and shut the door and —— (Tr. 288)

A. Well, that was happening so quick, I couldn't say. It was ——

Q. When she had took off, in what manner did she take off.

A. Well, it would — the car on the track and then she headed off — it would be a north, northern direction, northeast.

Q. North away from —

A. Yes.

Q. Away from the track toward the highway?

A. That's right.

Q. Was she running at that time?

A. Well, she was getting out of the way, she had time to take about three, four steps. That is the last I could see of what happened there. I figured she was about 10 feet from the car.

Q. You figure she was about 10 feet from the car when the train struck, is that it?

A. Huh?

Q. She was 10 feet from the car when the car was hit by the train?

A. Well, approximately that. She was running and you could see the space between her and the car.

Q. Did you think she had escaped when you saw all this?

A. I thought she would make it." (Tr. 289)

John J. O'Neill specifically testified that he did not know how long this truck was on the crossing before it was hit. (Tr. 297)

Lawrence Shaw O'Neill testified that his attention to the approach of the train was attracted by certain whistle signals. He further stated that when he glanced up in the direction of the train that he did not notice an automobile on the crossing; (Tr. 304) that when he first looked at the crossing the truck was stalled there; as he put it:

> "* * * it was sitting there on the tracks." (Tr. 305)

He further testified that when he first looked at the crossing he did not see anyone in the automobile and then in a split second the girl jumped out of the car, hesitated for a moment, and started running and that she had taken three or four steps when the impact occurred. (Tr. 306)

In view of this state of the record, appellant asserts that the testimony of the engineer and the fireman as to the manner in which this truck was driven on to the crossing stands uncontradicted.

On examination by plaintiff appellee's counsel, the engineer testified that he first observed this truck

after he had ceased blowing the second long whistle. (Tr. 252-253) At this point the truck was 25 feet from the crossing; (Tr. 253) when he had finished the second long blast he was still east of the Milwaukee overpass but was unable to fix the exact distance. (Tr. 254) Prior to this time the truck had not come into his view. (Tr. 255) He was then interrogated as follows:

"Q. All right. Now, will you tell us then what happened?

A. Well, I made an application of the brakes. The truck came out in this kind of a blind area here (indicating). This Milwaukee viaduct, I made — I couldn't tell you how much of an air application I made, but I made an application of the brakes and I felt the train take hold, and then the truck momentarily stopped at the crossing.

Q. Stopped at the crossing?

A. Just momentarily stopped clear of the crossing.

MR. McKEVITT: Clear of the crossing?

A. Clear.

Q. (By Mr. Etter): You mean clear —

A. Of the road crossing over the track.

Q. Clear of the crossing on the south side of the crossing?

A. That's right.

Q. How close was it to the crossing?

A. It was clear —

Q. Beg your pardon?

A. Oh, it must have been 10 feet, anyhow, before it was clear of the track.

Q. It was clear. All right, and then what happened?

A. I released the air.

Q. Beg your pardon?

A. I released the air that I had set on the train.

Q. You released the air. All right, then, and will you tell us what happened?

A. Then all at once the truck started bucking up onto the track. (Tr. 256)

Q. All right, where were you when it started bucking? Where was your train?

A. I was coming under the viaduct at that time approaching the crossing. Oh, I would say —

Q. Coming into the viaduct, under the viaduct?

A. I would say about, oh, 600 feet from the crossing at this time.

Q. About 600 feet. When it started bucking, then what happened?

A. That is about — now, I don't know just exactly the measurements on that, but I was coming under the viaduct when this happened.

Q. When it started to buck?

A. Yes.

Q. That is, about 10 feet south of the crossing?

A. It was just clear of the crossing before it started bucking at —

MR. McKEVITT: Keep your voice up. I didn't hear that last part of the question and answer at all.

A. I had just released the air and then the truck started bucking up on the track just as I was coming under the viaduct.

Q. (By Mr. Etter): Just as you were coming under the viaduct?

A. Yes. (Tr. 257)

* * * *

Q. Calling your attention to the Defendant's Exhibit No. 26, talking about that point, would it have been west, just west on the west pier, or would it be right there (indicating), do you think, when you saw the car buck right up onto the crossing?

A. I couldn't tell positively, because my attention was diverted mostly to the truck. I couldn't tell you, pin point down the footage there, just how close I was to the truck.

Q. No, but all I am trying to ask you, do you think you were out the other side of it or on this side of the viaduct? You knew you were at the viaduct.

A. I was at the viaduct, but I tell you just how far, I couldn't tell you.

Q. All right.

A. Because my attraction was on this car.

Q. Would it be fair, then, to both of us to say you were right about the middle of the viaduct?

A. Well, close to it.

Q. All right. And that is when the car bucked out to the track?

A. It bucked its way onto the track, yes.

Q. All right. So then you were right under the viaduct, what did you do when the car bucked right out on the track?

A. Well, I had already released the air when I saw the truck approach.

Q. Beg your pardon?

A. When I saw the car approach the crossing, it come out from behind this pier up to the

crossing, and I had a feeling that they might try to go across so I set some air, how much I don't know. But I had set an amount of air and it was just one of those things of slowing down in case, and when it bucked, when it come up to the crossing, it momentarily stopped. Well, that was a relief to me, I released the air.

Q. All right.

A. Well, the next thing that come up, the truck started bucking its way up there on the track.

Q. All right, the air was released at the time the car bucked up on the track and you were under the viaduct?

A. That's right.

Q. In other words, you had no air on when you were under the viaduct, but the car then bucked up to the track and you had just released the air?

A. I had released the air.

Q. All right, what did you do when you saw it go right up on to the track?

A. That is when I had to go into emergency.

MR. McKEVITT: You what?

A. I had to take and put the train into emergency when the truck went on the track.

Q. (By Mr. Etter): You put it in emergency?

A. Yes.

Q. All right. What did you do? Tell us now just exactly what you did.

A. What I did was have to sit there, because that is all I could do was put the train in emergency. That dumped all my reservoirs into the train line." (St. 261-263)

Fireman Williams testified that when he first saw the truck the Diesel engine was just east of the Milwaukee overpass. (Tr. 415) He estimates a distance in this regard of 100 feet. (Tr. 416) At this point he states that the truck was 15 or 20 feet from the crossing and that it was moving. He fixes its speed at about 10 miles per hour. He testified:

"Well, it slowed down very slow or may have come to a stop, I don't know." (Tr. 416)

His testimony is further to the effect that at this time the truck was stalled off the crossing. He was asked:

"Q. Then what did you observe?

A. Well, it started ahead.

Q. Describe its motion. Was it smooth —

A. Well, it jumped, you might call it jerked, ahead, it wasn't smooth." (Tr. 416)

The deceased was thoroughly familiar with this

crossing. In November, 1950, her parents took up the residence she was occupying at the time of her death, March 8, 1952. (Tr. 64) She was attending school at Ellensburg, four miles distant; (Tr. 130) in order to do so she would have to cross at this point the main line of the Northern Pacific at least twice a day during the school period. (Tr. 131) The plaintiff, her father, testified he knew this was the main line of the Northern Pacific; that it operated passenger trains and freight trains over that crossing day and night; and that his daughter also knew of these facts. (Tr. 131) The crossing was protected by a standard crossbuck sign. (Defts. Ex. 1)

On cross-examination plaintiff appellee was shown Defendant's Exhibits 17 and 18 taken March 10th, two days after the accident. (Tr. 111) In Exhibit 17 the camera was east of the crossing and is a close-up view of the crossing looking toward the west. (Tr. 111) He stated that that was a fair representation of that crossing on March 8, 1952. (Tr. 112) He was shown Defendant's Exhibit 18, likewise taken two days after the accident. In that exhibit the camera is west of the crossing, and facing toward the east, the camera being in the center of the track. He testified that that was a fair representation of the conditions on March 8th. (Tr. 115)

He was shown Defendant's Exhibit No. 20, also taken two days after the accident; there the camera is 300 feet east of the crossing facing towards the west. He testified that that was a fair representation of the conditions that existed on March 8th.

He was shown Defendant's Exhibit 21, taken two days after the accident; in that exhibit the camera is 350 feet east of the crossing facing west; he admitted that that was a fair representation of the conditions existing on the day of the accident. (Tr. 122)

He was shown Defendant's Exhibit 23, with the camera 450 feet east of the crossing facing west; he was shown Defendant's Exhibit 24, with the camera 500 feet east of the crossing facing west, taken two days after the accident; he was shown Defendant's Exhibit 25, with the camera 600 feet east of the crossing facing west; he was shown Defendant's Exhibit 26, with the camera 700 feet east of the crossing facing west; he was shown Defendant's Exhibit 27, with the camera 900 feet east of the crossing facing west; he testified that all of these exhibits were fair representations of the conditions existing in that vicinity on the date of the accident. (Tr. 123-125)

He was shown Defendant's Exhibit 28, with the

camera 1000 feet east of the crossing facing west; Exhibit 29 with the camera 1400 feet east of the crossing facing west; he admitted that these exhibits were fair representations of the conditions existing on the date of the accident. (Tr. 126)

He was shown Defendant's Exhibit 30, a panoramic view consisting of 4 pictures; in this exhibit the camera was 25 feet south of the crossing facing north and east; he admitted that that exhibit was a fair representation of the conditions that existed on that date.

He was shown Defendant's Exhibit 31, a panoramic view consisting of three pictures, with the camera 150 feet south of the crossing looking east and north, taken two days after the accident; he admitted that that exhibit was a fair representation of the conditions that existed on the day of the accident. (Tr. 127)

So there will be no misunderstanding on the part of the Court, all of the exhibits that have been referred to were taken two days after the accident.

Plaintiff appellee testified that on the day of the accident his daughter asked permission to use the truck in order to go to a mail box situated on a state highway shown on Defendant's Exhibit 1. In order to go to the mail box she had to go over this crossing. Her father granted her this permission. (Tr.

135) He testified that he had cautioned her to watch out for trains. (Tr. 136)

In order to meet any contention that the Last Clear Chance Doctrine is applicable in this case, appellant called as an expert Joseph Gaynor. This man was eminently qualified to testify as such. (Tr. 429-432) This witness testified that a train of this character, going at 50 miles per hour, could not be stopped in a distance of less than 1250 feet; at 55 miles an hour, a minimum distance of 1400 to 1450 feet; at 64 miles an hour, a minimum distance of 1800 to 1850 feet.

It will undoubtedly be contended by appellee that this truck was stationary on the crossing for a substantial period of time prior to being struck. The Court will recall the testimony of the witness, John J. O'Neill, to the effect that he saw her open the door of the truck, step out, close the door, and that she got about 10 feet from the truck before she was struck by it after the collision.

The witness Gaynor testified that if this train had been dynamited when 700 feet distant from the crossing, going at a speed of 50 miles per hour, it would take it 9.4 seconds to reach the crosing on a free run, and if braked it would take about 10½ seconds. (Tr. 434) Traveling at 60 miles an hour the witness testi-

fied that on a free run it would require about 8 seconds to reach the crossing from 700 feet out. At 64 miles per hour it would traverse the 700 feet on a free run in about 7.4 seconds, and with an emergency braking in about 8½ seconds.

Appellant at the close of plaintiff's case moved for a directed verdict upon the ground that there was no evidence of a substantial character or probative value which established any of the material allegations of the complaint. The motion was based upon the further ground that the deceased girl was guilty of negligence as a matter of law, and upon the further ground that the plaintiff himself was guilty of contributory negligence in permitting his daughter to drive this truck without a driver's license. (Tr. 355-364) This motion was denied by the Court. (Tr. 365)

At the close of all the evidence the appellant moved the Court for a directed verdict for the reasons assigned in the motion made at the close of plaintiff's case and upon the additional ground that the deceased girl was guilty of negligence in that she violated a positive statute of the State of Washington requiring the operator of an automobile to have it under such control as to be able to bring it to a stop within 10 feet of the closest rail. This motion was denied. (Tr. 517)

SPECIFICATIONS OF ERROR

I

The District Court erred in denying appellant's motion for a directed verdict at the close of appellee's case.

II

The District Court erred in denying appellant's motion for a directed verdict at the close of all of the evidence.

III

The District Court erred in denying appellant's motion for judgment notwithstanding the verdict or in the alternative for a new trial.

IV

The District Court erred in refusing to give appellant's Requested Instruction No. 8:

> "Defendant's Requested Instruction No. 8:
>
> I instruct you that under the laws of the State of Washington in force at the time of this accident it was unlawful for a person to cause or knowingly permit his child under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator unless such child has first obtained a vehicle operator's license. Said law further provides that no person shall authorize or knowingly permit a motor

vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator. If you find from the evidence in this case that Erna Mae Everett at the time in question did not have a vehicle operator's license and that the plaintiff herein knew that she did not have such license, and if you find that said plaintiff authorized or knowingly permitted his daughter to operate the vehicle in question, then I instruct you that the plaintiff violated the law above referred to and was guilty of negligence. If you further find that such negligence was the direct and proximate cause of his daughter's death then your verdict should be for the defendant." (Tr. 18-19)

V

The District Court erred in refusing to give that portion of appellant's Requested Instruction No. 3, or an instruction substantially similar thereto, which portion of said instruction reads as follows :

"The operators of the train had a right to assume, until the contrary appeared, that the occupant of such automobile, exercising reasonable care for her own safety, would give the train the right of way to which it was entitled under the law, and the operators of said train were not required to take any action intended to slow the speed of the train until they were aware that the said vehicle did not intend to give the train the superior right of way." (Tr. 19)

VI

The District Court erred in refusing to give appel-

lant's Requested Instruction No. 7, or an instruction substantially similar thereto, which instruction reads as follows:

> "Defendant's Requested Instruction No. 7:
> I instruct you that if the deceased in the operation of her automobile knew of the approach of the defendant's train, and could have stopped short of the tracks and thus avoided the accident, but rather attempted to beat the train across the track, that such action was negligence on her part. If you find from the evidence that the deceased died as the result of attempting to beat the defendant's train across said track then your verdict should be for the defendant." (Tr. 19-20)

VII

The District Court erred in giving the following instruction:

> "You are instructed that it is the law of the State of Washington that every engineer driving a locomotive on any railway who fails to ring the bell or sound the whistle upon such locomotive or cause the same to be rung or sounded at least 80 rods from any place where such railway crosses a traveled road or street on the same level, except in cities, or to continue ringing of such bell or sounding of such whistle until such locomotive has crossed such road or street, shall be guilty of a misdemeanor. Therefore, if you find from the evidence in this case that the engineer of defendant's railroad train, F. W. Scobee, failed

to ring the bell or sound the whistle upon defendant's locomotive at least 80 rods east of the O'Neill crossing, and failed to continue the ringing of such bell or the sounding of such whistle until the locomotive had crossed O'Neill Road, such failure would be negligence on the part of the defendant herein, and if such negligence proximately caused the death of Erna Mae Everett, it would entitle the plaintiff to a verdict in his favor, in the absence of contributory negligence on the part of Erna Mae Everett. You will be instructed on the various aspects of contributory negligence later on, and I have given you some instructions heretofore in these instructions." (Tr. 20)

VIII

The District Court erred in giving the following instruction:

"Now there is involved in this case what is known as the doctrine of last clear chance. It is permissible to use the doctrine only after you find, and you may not use it unless and until you first find, that in the events leading up to the accident in question, both the deceased and the defendant were negligent.

"The doctrine of last clear chance is divided into two phases to cover two separate possibilities: (1) that where the defendant actually saw the peril of the traveler on the highway and should have appreciated the danger and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the traveler's negligence may have continued up to

the instant of the injury; and (2) that where the defendant did not actually see the peril of the traveler, but by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the locality should have seen the peril and appreciated it in time by the exercise of reasonable care to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the traveler's negligence had terminted or eliminated or culminated in a situation of peril from which the traveler could not by the exercise of reasonable care extricate himself.

"Therefore, if either of the two conditions just mentioned are found by you to have existed with respect to the collision in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injuries suffered by the plaintiff, that is, on account of the death of Erna Mae Everett in this case, and proximately resulting from the accident, despite the negligence of the deceased." (Tr. 21-22)

IX

The District Court erred in giving the following instruction:

"Gentlemen of the jury, I overlooked one claim of negligence here of the plaintiff, and on that point I instruct you that if you find from the preponderance of the evidence that the defendant railway company negligently failed to main-

tain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing, and you find that that negligence was the proximate cause of the death of Erna Mae Everett and you further find it appears that there was no contributory negligence on the part of Ena Mae Everett, then your verdict should be on that point for the plaintiff." (Tr. 23)

X

The District Court erred in denying the defendant's motion to withdraw from jury consideration subdivision (g) of paragraph VI of the complaint reading as follows:

"Defendants negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to said crossing and immediately next to the wooden planking at said crossing." (Tr. 499-500)

XI

The District Court erred in denying defendant's motion to withdraw from jury consideration subdivision (d) of paragraph VI of the complaint reading as follows:

"The defendant neglected and failed to sound

the crossing signals required by the statutes of the State of Washington as the locomotive approached said crossing by either blowing a whistle or sounding a bell of said locomotive." (Tr. 498)

XII

The District Court erred in refusing to permit defendant to prove under cross-examination of the plaintiff that on and prior to March 8, 1952, the deceased, Erna Mae Everett, did not have an operator's license to operate a motor vehicle upon a public highway in the State of Washington. (Tr. 158-165)

XIII

The District Court erred in sustaining the objection of plaintiff's counsel to defendant's offer to prove that on and prior to March 8, 1952, the deceased, Erna Mae Everett, did not have an operator's license to operate a motor vehicle upon a public highway in the State of Washington. (Tr. 166)

XIV

The District Court erred in denying the appellant's motion for a new trial upon the basis that the verdict was excessive.

SUMMARY OF ARGUMENT

1. The plaintiff's intestate was guilty of contributory negligence as a matter of law. Under the undisputed evidence in the case there were only two witnesses of the immediate approach of the truck to the crossing — the fireman and the engineer. Since the engineer was called as a witness by appellee and since he was not an adverse witness under the Federal Rules of Civil Procedure, plaintiff is bound by his testimony as to the whistle signals that were given; the distance of the Diesel locomotive from the crossing when he first observed the truck; the distance of the truck from the crossing when he first observed it. The giving of the whistle signals, as testified to by the engineer, is partially and substantially corroborated by plaintiff's witness, Lawrence Shaw O'Neill. The testimony of plaintiff's witness, John J. O'Neill, from which the inference is sought to be drawn that the statutory signals were not given, is negative in character. Even though the full statutory whistle signal was not given, the plaintiff's intestate was guilty of negligence as a matter of law since under the photographic exhibits introduced by defendant and acknowledged by plaintiff to be fair representations of the physical conditions on the day of the accident, it con-

clusively appears that for a minimum distance of 25 feet from the crossing the driver had an unobstructed view to the east of at least 686 feet; as a matter of fact these exhibits conclusively show that she had a much greater view.

2. With reference to the alleged negligence of the appellant concerning the conditions in and near the crossing, this was not an issue for jury determination since there is an utter absence of testimony that this condition had anything to do with the truck stalling on the crossing. Appellant urges that under the undisputed evidence in this case the alleged negligence of the railway company in maintaining the crossing was not the proximate cause of the accident.

3. This judgment can only be affirmed if it can be said from the whole record that the doctrine of Last Clear Chance was for jury determination. Appellant insists that there is no evidence in the record which justified the submission of this doctrine.

4. Aside from the foregoing, the District Court fell into error justifying and requiring a new trial in the particulars herein after discussed, and in any event the verdict is so excessive that it should be reduced.

ARGUMENT

Specifications of Error Nos. 1, 2 and 3

These specifications involve our basic contention that plaintiff's intestate was guilty of negligence as a matter of law and that no actionable negligence on the part of appellant is disclosed in the record.

As seen from appellant's statement of the case, three propositions were submitted to the jury:

(a) Was the appellant guilty of negligence in failing to give the statutory whistle signal?

(b) Was the appellant guilty of negligence in its maintenance of the crossing?

(c) The Last Clear Chance Doctrine.

The complaint specifically alleged that the truck was stalled on the crossing at the time it was struck by appellant's train. Appellant discusses these propositions in their order.

(a) Engineer Scobee, called as an adverse witness, testified that he began the giving of these signals at the whistle post. Since he had been dismissed as a party defendant it is appellant's contention that he was not adverse and that therefore appellee is bound by his testimony; as a matter of fact, the trial Court

ruled that this witness was not adverse. Witness this observation of the Court:

> "THE COURT: I think the adverse party rule is set out in Rule 43, Subdivision (b), of Rules of Civil Procedure, and this witness is no longer, of course, an adverse party—
>
> MR. McKEVITT: No.
>
> THE COURT: He has been dismissed as such, he is not an adverse party, and he isn't an officer or managing agent of the Northern Pacific Railway Company, so that the only right you would have to cross-examine is under 43(b), which is:
>
> > 'A party may interrogate an unwilling or hostile witness by leading questions,' and 'A party may call an adverse party or an officer, director, or managing agent of a public or private corporation,' but he is not in that class, and I don't think you would be justified in going any further in this line of examination." (Tr. 243)

The testimony of the engineer and the fireman as to the giving of these whistle signals has already been set forth.

The tesimony of plaintiff appellee's witness, Lawrence O'Neill, is to the effect that he heard two long blasts of the whistle followed by several short blasts. These are the same signals as described by the fireman and the engineer. The only point of difference

between their testimony and that of Lawrence O'Neill is as to the location of the Diesel when the two long blasts were sounded.

This being a diversity of citizenship case, the Federal Courts under the rule of *Erie R.R. Co. vs. Tompkins,* 304 U.S. 64, 82 L. ed. 1188, are governed by the case law of Washington where the cause of action arose.

The Supreme Court of the State of Washington has held that a party operating a motor vehicle approaching a railroad crossing may be guilty of contributory negligence as a matter of law even though the statutory whistle signals were not given.

> *Sadler vs. Northern Pacific Ry. Co.,* 118 Wash. 121, 203 Pac. 10.

In that case the plaintiff was a guest in a motor vehicle. The evidence disclosed that the train could have been seen for a distance of 70 feet back from the track 1000 feet away and in plenty of time for the plaintiff to have warned the driver. The Court said:

> "The jury were also instructed that the purpose of imposing upon railway companies the duty of giving signals prior to reaching highway crossings, and in limiting their speed within city limits, is to give warning to those about to use such crossings and to enable the train crew

to have their engine and train in more sufficient control, but such duty so imposed upon railway companies does not relieve one about to use such crossings, whether he be the driver of the machine, or situated, as was the deceased, Sadler, on the front seat with the driver, of the duty to use reasonable care for his own protection, or the positive duty imposed upon one in the position of the deceased, Sadler, to look and listen as he approaches the railroad track, of which he has knowledge; and in this case, even if the jury should find that the speed at which this train was approaching was excessive, and that all of the signals which they find should have been given were not given, yet, if the deceased, Sadler, by exercising reasonable care in the way of looking and listening, or in the taking of such other precautions as a reasonably prudent man would take for his protection, could have otherwise seen or heard the approach of the train from the noise or sounds incident to its operation, if there was such noise or sound, then the fact that some signals were not given, or that the train was going at a rate of speed greater than that provided by the city ordinance, would not permit a recovery on behalf of the surviving widow; or, if the jury should find that the deceased, Sadler, failed to exercise that degree of care imposed upon him, she should not recover, irrespective of the negligence on the part of the defendants, or either of them.

"These instructions stated the law correctly, and in spite of these instructions the jury must have found that Sadler looked and listened as he approached the railroad track, and therefore exercised reasonable care, or took the same precau-

> tions as a reasonably prudent man would have taken for his protection; and this in face of the fact, as testified to by Ball, the driver, that Sadler said nothing to him, and in face of the facts that the train could have been seen for a distance of seventy feet back from the track one thousand feet away, and in plenty of time to warn the driver, or to have left the truck. In face of these undisputed facts, we feel obliged to say that the matter of Sadler's contributory negligence was conclusively established and left no fact upon that question for the jury to determine."

The rule announced in the *Sadler* case was reaffirmed in the case of *Morris vs. Chicago, M., St. P. & Pac. R. Co.,* 1 Wash. (2) 587, 97 Pac. (2) 119, at page 124:

> "It is contended by respondent that appellants were negligent in operating the train at an excessive speed, and in failing to blow a whistle or give any warning. We held in *Sadler v. Northern Pac. R. Co.,* 118 Wash. 121, 203 Pac. 10, that the deceased was guilty of contributory negligence, as a matter of law, in that he failed to exercise the degree of care imposed upon him, and that the suing widow could not recover, irrespective of the negligence of the defendants."

(b) With reference to the alleged negligence of the appellant in the maintenance of the crossing and the immediate approach thereto there is an utter absence of evidence that this condition caused the truck to stall. As has been pointed out, apart from the en-

gineer and the fireman there were no eye witnesses of the immediate approach of the truck to the crossing. If their testimony is accepted as being uncontrodicted, which appellant asserts it is, the crossing condition could not have been a proximate cause of the accident; it was only an incident thereto.

If, as undoubtedly will be contended by appellee, this truck was stalled on the crossing for an appreciable period of time, then the situation would seem to fall within the language of the Illinois Appellate Court in the case of *Stefan vs. Elgin, Joliet & Eastern Ry. Co.,* Appellate Court of Ill., 120 N.E. (2) 52:

> "Syllabus 3. Even if roughness of crossing caused automobile engine to die so that automobile stalled in path of oncoming train, where motorist, after automobile stalled, saw train approaching when it was 900 feet away and did not attempt to get out of the automobile until the engine was about 30 feet away, condition of crossing was not the proximate cause of injuries sustained when train struck automobile."

In the course of its opinion in that case the Court, at page 55, said:

> "We shall assume but not decide that the condition of the crossing caused the automobile engine to die. Was the alleged negligence of the railway company in maintaining the crossing as it was the proximate cause of the accident? No

cases cited by the parties are of particular help on this question. Here again the plaintiff, after his car stalled, saw the train approaching when it was 900 feet away. We think reasonable men must agree that what transpired from the stalling of the car to the collision was not a natural unbroken sequence of events which the uneven crossing set in motion."

(c) The language of the complaint which invoked the Last Clear Chance Doctrine is contained in subdivisions (b) and (c) of paragraph VII of the complaint:

"(b) Defendant's servants operating said train, saw, or should have seen, that an unusually dangerous situation existed when plaintiff's vehicle, operated by Erna Mae Everett, stalled on said railroad track and said Erna Mae Everett was attempting to abandon and flee said vehicle. Yet, knowing that a failure to warn Erna Mae Everett would probably result in serious injury, the defendants proceed to run said train into said intersection and against plaintiff's said vehicle without previously giving any signal or warning by blowing the whistle or ringing the bell of the locomotive, or giving warning by way of any other device or kind whatsoever.

"(c) Defendants saw, or should have seen, that a collision with Erna Mae Everett was imminent and had the opportunity to realize and appreciate her danger, but the defendants, with reckless indifference to injurious consequences probable to result therefrom, failed to reduce the speed of said passenger train by applying full and sufficient braking power to the wheels of said locomotive and the cars following it * * *".

Appellant asserts that there is not a syllable of testimony in the record, either direct or by inference, which sustains this allegation.

The Doctrine of Last Clear Chance, as adopted by the Supreme Court of Washington, was clarified in the case of *Leftridge vs. Seattle,* 130 Wash. 541, 228 Pac. 302; the Court said:

> "Going no farther back into the decisions than to *Mosso v. Stanton Co.,* 75 Wash. 220, 134 Pac. 941, L.R.A. 1916A, 943, we find that case endeavored to clarify the last clear chance rule and define two separate conditions under which it was applicable, and the rule is announced as (1) that where the defendant *actually* saw the peril of a traveler on the highway and should have appreciated the danger and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the plaintiff's negligence may have continued up to the instant of the injury; but (2) that where the defendant did not actually see the peril of the plaintiff, but by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the locality *should have seen* the peril and appreciated it in time, by the exercise of reasonable care, to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the plaintiff's negligence had terminated or culminated in a situation of peril from which the plaintiff could not, by the exercise of reasonable care, extricate himself.
>
> "Thus we have two different situations to which

> the last clear chance rule applies. In the one, the plaintiff's negligence may continue up to the time of the injury if the defendant *actually sees* the peril; in the second, the plaintiff's negligence must have terminated if the defendant did not actually see the peril, but by the exercise of reasonable care *should have seen* it."

Appellant asserts that the record is devoid of any testimony of a substantial character or probative value that would bring the case at bar under either branch of the doctrine as above annouced.

In the case of *Delsman vs. Bertotti,* 200 Wash. 380, 93 Pac. (2) 371, the Court used the following language:

> "Appellant next argues that, conceding that appellant was guilty of contributory negligence, under the doctrine of last clear chance the court should have denied the challenge to the evidence and submitted that question to the jury, upon the theory that, under the first situation of the doctrine of last clear chance, as stated in Leftridge v. Seattle, 130 Wash. 541, 228 Pac. 302, a jury question was presented. *Whether or not any situation calling for the application of the doctrine of last clear chance is applicable in a given case, is a question of law to be determined by the court."* (Italics supplied)

In *Thompson vs. Porter,* 21 Wash. (2) 449, 151 Pac. (2) 433, speaking of the second branch of the doctrine, the Supreme Court of Washington used the following language:

"It is our opinion that the trial judge rightly ruled that there was not sufficient evidence to take the case to the jury under the first division of the last clear chance rule.

"Appellant further contends that the case should have been sent to the jury under the second division of the rule. Under that division the defendant may be held liable under the doctrine of last clear chance, notwithstanding the negligence of the injured person and even if he did not see him, but should have seen his peril and appreciated it in time to have, by reasonable care, avoided the injury. But, under those circumstances, the defendant can *only* be held liable:

> " '* * * when the plaintiff's negligence had terminated or culminated in a situation of peril from which the plaintiff could not, by the exercise of reasonable care, extricate himself.'

"In summing up the two situations to which the last clear chance applies, the court said, in the *Leftridge* case, and this is the paragraph of the opinion so frequently quoted in our own opinions:

> " 'Thus we have two different situations to which the last clear chance rule applies. In the one, the plaintiff's negligence may continue up to the time of the injury if the defendant *actually* sees the peril; in the second, the plaintiff's negligence must have terminated if the defendant did not actually see the peril, but by the exercise of reasonable care *should have seen* it.'

"Certainly, in this case Thompson's negligence

had not terminated, and it would seem equally certain that it had not culminated in a situation of peril from which he could not extricate himself. He could have stepped off the pavement at any instant. In fact, we have heretofore squarely so decided.

> " 'In walking on the right hand side of the highway, the respondent violated the statutory provision (Rem. Rev. Stat., Sec. 6362-41 (P.C. Sec. 196-41), subd. (6)) which requires pedestrians on highways to travel on and along the left side of the highway, and that pedestrians upon meeting an oncoming vehicle shall step off the paved or main traveled portion of the highway. * * * His negligence never terminated nor culminated in a situation of peril from which he could not by the exercise of reasonable care extricate himself. His negligence continued up to the instant of the injury.' Steen v. Hedstrom, 189 Wash. 75, 78, 63 P. (2d) 507.

"The appellant, however, urges that one who is oblivious to his danger is, in effect, as unable to extricate himself as one who is physically unable to do so. It is further said that it is just as reprehensible to run down a man who is apparently oblivious to his peril as it is to run down one who, through negligence, has gotten his foot stuck in the road and is obviously physically unable to extricate it. That this is so must be conceded. But, in applying the last clear chance rule, *we are not exclusively concerned with the negligence of the defendant in the action. In fact, we are primarily concerned with that party who seeks to have his own negligence excused by*

the application of the rule. The negligence of the man unable to extricate his foot has terminated. His negligence is remote, rather than proximate and casual. The man walking on the wrong side of the road in disobedience to the statute is not only negligent *per se* until and at the very moment of his injury, but, moreover, his obliviousness to his danger in so proceeding is in and of itself negligence. In fact, under the theory urged, if he should be run down, he would be in a better position to have his negligence excused, under the last clear chance rule, if he took no care whatever for his own safety than if he kept careful watch for cars coming up from behind; for, if he did that, he might have real difficulty in convincing a jury that he was mentally in a state of oblivion. (Italics supplied)

"If we should interpret the second provision of the rule of the *Leftridge* case as appellant urges us to do, it would seem that, in future cases of this type in which one was run down while walking on the wrong side of the highway, in disobedience of the statute and without paying any attention whatever to cars that might be coming up behind him, he would need only to testify that the visibility was good in order to make a case for the jury under the doctrine of last clear chance."

The Court's attention is now directed to the case of *Coins vs. Wash. Motor Coach Co.,* 34 Wash. (2d) 1, 208 Pac. (2) 143. That case was one wherein a bus was stalled at night blocking the major portion of an arterial highway. The driver had flares in his bus and he was held to have been negligent in failing to place

them where they could be seen by drivers approaching from either direction. Plaintiff requested an instruction including both phases of the last clear chance doctrine which the trial court refused to give. The Supreme Court said:

> "We think that the court was correct in its decision. In order for the first phase of the rule to apply, there must be evidence that the defendant *actually saw* the peril in time to have avoided it. Here, there is no evidence to contradict Kimmel's assertion that, as soon as he saw the bus, he did what a reasonable man would have done to avoid running into it; put on the brakes, though to no avail. Even if Kimmel ought to have seen the bus before this time, that fact is not sufficient in itself to raise an inference that he did see it. *Thompson v. Porter,* 21 Wash. (2) 449, 151 Pac. (2) 433. For this reason, we do not think that the situation called for an instruction on the first phase of the rule.
>
> "In order to bring a case within the second phase of the rule, it does not matter whether or not the defendant actually saw the peril so long as he should have seen it; but, in such a situation, the plaintiff's negligence must either have terminated or culminated in a situation of peril from which he could not, with reasonable care, have extricated himself. In the present case, the bus driver's negligence in failing to warn approaching automobiles of the peril had clearly not terminated, but continued up to the moment of impact; and while it is true he could not have extricated his bus from the ditch before the approaching Coins car had reached it, it is prob-

able that he could have averted the accident by taking proper precautions which it was well within his power to do. In such a situation, Kimmel having been unconscious of the peril, we are not of the opinion that the second phase of the rule was applicable.

"The judgment is affirmed."

In *Everest vs. Riecken,* 30 Wash. (2) 683, 193 Pac. (2) 353, the Supreme Court of Washington used this language:

"We are concerned not with a last possible chance but with a last clear chance; and a clear chance to avoid a collision involves the element of sufficient time to appreciate the peril of the party unable to extricate himself and to take the necessary steps to avoid injuring him. As we said in *Steen v. Hedstrom, supra*:

> " 'Last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to effectually act upon the impulse to save another from injury';

or, as was said in *McLeod v. Charleston Laundry Co.,* 106 W. Va. 361, 145 S.E. 756, and quoted with approval in *Juergens v. Front,* 111 W. Va. 670, 163 S.E. 618:

> " 'The authorities are unanimous in holding * * * that there must be an appreciable interval of time intervening between the injury and the driver's knowledge or notice of the * * * dangerous situation.' "

See also, *Bagwill v. Pacific Electric R. Co.,* 90 Cal. App. 114, 265 Pac. 517, where the appellate court of California said:

> "'Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. There seems still to be some misconception of this doctrine. * * * It was not devised as a last resort to fasten liability on defendants. * * * We are not to tear down the facts of a case and rebuild the same so that, by a trimming down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last *clear* chance, not possible chance.'"

In the recent case of *Stokes vs. Johnstone,* decided by the Supreme Court of the State of Washington on September 1, 1955 (Wash. Dec., Sept. 14, 1955, Vol. 147, No. 7, page 288), the Supreme Court of the State of Washington reaffirmed all of the principles set forth in the foregoing decisions.

Concerning this doctrine, this Honorable Court, speaking through Circuit Judge Garrecht in the case of *Deere vs. Southern Pacific Co.,* 123 Fed. (2) 438 (at page 443) used the following language:

> "It must be kept in mind that the doctrine of last clear chance means just what the words im-

ply and that the very essence of the rule is that it is applicable only where, notwithstanding another's negligence, the defendant, after realizing, or where under the circumstances he should have realized, that that other party cannot escape (due either to unawareness or to physical inability), has a clear chance to avoid the accident by the exercise of ordinary care. It is an absolute 'requirement of the doctrine of last clear chance that the peril of the party who relies upon it be inescapable or that he be oblivious to it.' Stewart v. Capital Transit Co., 70 App. D.C. 346, 108 F. 2d 1, 3. See, also, Wallis v. Southern Pac. Co., 184 Cal. 662, 673, 195 P. 408, 15 A.L.R. 117. From the testimony above related, and from the evidence taken as a whole, the only reasonable conclusion is that Deere was fully cognizant of the approach of the train. In addition, he was not in a position from which he could not extricate himself. Therefore, it follows that the defendant did not have the later chance to avoid the accident, and that the doctrine of last clear chance, then, is unavailable to plaintiff. Kansas City Southern R. Co. v. Ellzey, 275 U.S. 236, 241, 48 S. Ct. 80, 72 L. Ed. 259; McHugh v. Market St. Ry. Co., 29 Cal. App. 2d 737, 743, 85 P. 2d, 467. Plaintiff has utterly failed to sustain her burden of showing that the deceased could not have escaped injury by the exercise of ordinary care. Young v. Southern Pac. Co., 189 Cal. 746, 755, 210 P. 259. * * *"

In addition to her negligent failure to yield the right of way to the train, appellee's intestate was guilty of negligence *per se* in that she violated Sec.

6360-104 Remington's Revised Statutes of Washington, which provides:

> "Any person operating any vehicle * * * other than those specifically mentioned above, shall, upon approaching the intersection of any public highway with railroad or interurban grade crossing, reduce the speed of such vehicle to a rate of speed not to exceed that at which, considering view along such track in both directions, such vehicle can be brought to a complete stop not less than ten (10) feet from the nearest track in the event of an approaching train. * * *"

Appellant closes this discussion of the Last Clear Chance phase with this observation from the Supreme Court of the State of Washington in the case of *Zettler vs. Seattle,* 153 Wash. 179, 279 Pac. 57:

> "The last clear chance doctrine is a very just and salutary rule to be applied in a proper case, but its misapplication is fraught with great danger and often leads to unjust results, because it always invites a jury to disregard or excuse contributory negligence which would otherwise bar the action."

ARGUMENT IN SUPPORT OF MOTION FOR NEW TRIAL

In the alternative, appellant asserts that a new trial should be granted for the following reasons:

Specifications of Error Nos. 4, 12 and 13

These specifications of error may be discussed under one heading.

As has already been disclosed, at the time plaintiff's intestate was driving this panel truck she did not have an operator's license under the laws of the State of Washington. In Revised Code of Washington, 46.20.230 (1937 c. 188, sec. 62; R.R.S. Sec. 6312-62) is found the following provision:

> "Unlawfully permitting child to operate. It shall be unlawful for a person to cause of knowingly permit his child or ward under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator, unless such child or ward has first obtained a vehicle operator's license. No person shall employ a person to operate a motor vehicle who is not licensed as an operator. No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator."

In the case of *Atkins vs. Churchill,* 30 Wash. (2) 859, 194 Pac. (2) 364, is found the following language:

"In addition, there was ample evidence to warrant submission to the jury of the question of negligence of appellant in entrusting his automobile to an unlicensed minor. *Forman v. Shields,* 183 Wash. 333, 48 P. (2) 599; *Smith v. Nealey,* 162 Wash. 160, 298 Pac. 345. See, also, annotation, 168 A.L.R. 1364 *et seq.* In that annotation is collected the cases which support the general rule that the owner of a motor vehicle, who entrusts the vehicle in the hands of an unfit person, thereby enabling the latter to drive it, may be held liable for an injury negligently inflicted by the use made of the vehicle by its driver as a proximate result of the incompetency or unfitness of the driver, although the use being made of the vehicle at the time of the injury was beyond the scope of the owner's consent. The authorities uniformly hold that it is negligence *per se* for the owner of a motor vehicle to entrust it to a minor under the age specified by statute. *The prohibitory enactment itself constitutes a conclusive declaration that an individual younger than the age designated is incompetent to drive a motor vehicle.*" (Italics supplied)

Specification of Error No. 5

Under the testimony of appellant's engineer and fireman, appellant's Requested Instruction No. 3 should have been given. This instruction involved the proposition that appellant's train had the right of way under the law and that the operators thereof were not required to take any action for diminishing the speed of the train until such operators were rea-

sonably aware that the driver of the vehicle did not intend to give the train the right of way. No citation of authority is necessary to establish this proposition.

Specification of Error No. 6

Appellant's Requested Instruction No. 7 should have been given. There is substantial evidence in the record to justify the proposition that plaintiff's intestate was attempting to "beat" the train across the crossing.

Specification of Error No. 7

This specification deals with the assigned error of the Court in instructing the jury with reference to the statutory provisions of the Washington law re sounding of whistle signals at a point 80 rods from a crossing such as is involved here. This specification of error finds its complete justification in the case of *Sadler vs. Northern Pacific Railway Company, supra.*

Specification of Error No. 8

This specification deals with an instruction given by the Court wherein the jury was permitted to render a verdict in favor of the plaintiff if it found that appellant was guilty of negligence under the Last Clear Chance Doctrine.

This instruction was erroneous for two reasons:

(1) Under the state of the record as heretofore delineated there was no testimony of a substantial character or probative value to justify the submission of such an issue to the jury;

(2) Since, as under the decisions of the Supreme Court of the State of Washington heretofore referred to the application of this doctrine is a question of law to be first determined by the trial Court, it was erroneous for the trial Court to leave to jury consideration the question of whether or not the first branch of the Last Clear Chance Doctrine or the second branch of that doctrine, as stated by the Supreme Court of the State of Washington, applied.

SPECIFICATIONS OF ERROR NOS. 9 AND 10

This specification deals with the instruction given by the Court touching the alleged negligence of the appellant railway company in failing to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing immediately next to the wooden planking at the crossing, and defendant's motion to withdraw from jury consideration sub-division (g) of paragraph VI of the complaint already referred to. This proposition has al-

ready been discussed with particular reference to the case of *Stefan vs. Elgin, Joliet & Eastern Railway Co., supra.*

Specification of Error No. 11

This specification deals with the denial of the trial Court, upon motion of appellant, to withdraw from jury consideration subdivision (d) of paragraph VI of the complaint touching the alleged failure of the appellant to give the statutory crossing signals required by the statutes of the State of Washington. This specification has already been covered.

Specification of Error No. 14

This specification of error deals with appellant's motion for a new trial based upon the contention that the verdict was excessive. It has already been seen that general damages were awarded plaintiff for the death of his daughter in the sum of $8,000.00. The girl would have been 17 years old in another month. She was a junior in high school. (Tr. 68-69) She was a good healthy girl, had good grades, sewed nicely, helped her dad with the farm work and was capable of doing much of the housework. (Tr. 336-337) There was no testimony as to the pecuniary value of her services.

The pertinent portion of the statute under which this action is based reads as follows:

> "A father, or in case of the death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child . . ." (*Hedrick v. Ilwaco R. & N. Co.,* 4 Wash. 400, 30 Pac. 714.)

In the case cited above it was pointed out that although at common law a parent could not recover for the wrongful death of his child, he could maintain an action for the loss of services of his minor child from the time of the injury to his death, and in speaking of the statute the court said:

> "The object of the statute is to create a new and independent right of action for the loss of services subsequent to the decease of the child, which did not exist at common law."

The court then went on to say:

> "The measure of damages in such cases is the value of the child's services from the time of the injury until he would have attained the age of majority, taken in connection with his prospects in life, less the cost of his support and maintenance."

The reasoning in the *Hedrick* case is still being applied in the Washington courts.

In *Skidmore vs. Seattle,* 138 Wash. 343, 244 Pac. 545, the court said:

> "We, of course, must recognize that the father cannot recover more than his actual pecuniary loss, since the doctrine of punitive damages has been repudiated by this court in its repeated decisions."

The court, however, went on to say that the father could maintain an action for the injury or death of his child and that this meant substantial damages, measured as held in the early case of *Hedrick vs. Ilwaco R. & N. Co.,* cited above. Further discussing the *Hedrick* case the Supreme Court said:

> "While this is a sound theoretical measure, it is, of course, one which is impossible of application with any degree of exactness in the vast majority of cases; but this measure of loss for the death of a minor is the only theoretical measure that can be adopted, having in mind that it is the actual pecuniary loss to the father that is the measure of his right of recovery. So we must apply such measure as best we can, and upon that theory approximate the father's actual loss."

In *Skeels vs. Davidson,* 18 Wash. (2) 358, 139 Pac. (2) 301, a comprehensive discussion of the question of damages for the wrongful death of a minor child is found, and on page 369 stated that the court was justified in instructing the jury as follows:

> "You shall determine the value of the services

of this child from the date of the injury until he would have attained the age of majority, less the cost of his support and maintenance to his parents during this interval."

Also, at page 373-374 the court said:

"The interpretation of the statute creating the right of action of the respondent in this case, as made in the Hedrick case over fifty years ago, has ever since been recognized as valid, and, although the rule of damages therein declared has been somewhat liberalized under the stress of necessity, that interpretation is still binding upon us. Furthermore, in spite of the seeming absurdity of instructing juries to make a computation which, in many cases, it is wholly impossible for them to make, an extensive research has not revealed a satisfactory substitute.

"The chief practical objection to the measure of damages under discussion is the fear that, since it can rarely be applied with anything like certainty, it is likely to promote excessive verdicts. This difficulty is inherent in the matter, as in many other phases of the law of damages, such as, for example, where damages for pain, mental suffering, alienated affections, etc. must be assesed In such cases, no exact standard of measurement can be prescribed. The measure of damages under discussion serves, at least, to impress upon juries that the law does not intend or contemplate the impossible thing of completely compensating a parent for the loss of a dearly beloved child."

While the court held that a strict application of this rule would result in injustice because applying it strictly would mean that only nominal damages could be recovered in the average case for the death of a child, it still holds to the ruling that an instruction along this line is correct and should be a guide to the jury in determining the amount of damages to be awarded for the wrongful death of a child. Applying this reasoning to the case at bar, appellant submits that there is nothing in this record to sustain a verdict of $8,000.00 for the death of a child 17 years of age where there is no showing as to the earnings of said child or the cost of her support. Therefore, the only conclusion which can be reached is that the result was based on pure speculation, passion and prejudice and is completely out of proportion to the measure of damages contemplated by the cases and the general rule governing actions of this kind.

CONCLUSION

But one conclusion can be drawn from the undisputed evidence and from the uncontroverted physical facts disclosed by the record, namely, that the deceased driver was guilty of contributory negligence as a matter of law and that the trial Court should

have granted appellant's motion for a directed verdict, and, failing this, should have granted its motion to set aside the verdict and judgment and granted a new trial.

Respectfully submitted,

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Dated at Spokane, Washington, October 17, 1955.